IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No 184 of 2002

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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VISVESVARAYA INDUSTRIAL RESEARCH AND DEVT. CENTRE

Versus

O.L.OF RUSTOM MILLS & IND. LTD & ANR.

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Appearance:

1. COMPANY APPLICATION No. 184 of 2002

MR PC KAVINA with MR PP BANAJI for the Petitioner

MR RM DESAI for Respondent No. 1,6

MRS SWATI SOPARKAR for Respondent No. 2

NOTICE SERVED for Respondent No. 3-4,7,10

MR NR PARIKH for Respondent No. 5

SINGHI & CO for Respondent No. 8

MR DS VASAVADA for Respondent No. 9

NANAVATI & NANAVATI for Respondent No. 11

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CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 03/07/2003

ORAL JUDGEMENT

This Judge's Summons has been taken out by M. Visweswaraya Industrial Research and Development Centre (hereinafter referred to as 'the Centre') for recovery of the possession of the office premises situated at Cuffe Parade, Mumbai.

The applicant has prayed as under:-

"a) that this Hon'ble Court be pleased to direct the Official Liquidator, High Court, Gujarat, appointed as the Official Liquidator of Rustom Mills & Industries Ltd. to take over vacant possession of Unit No.60 in Trade Centre Arcade, in World Trade Centre, Cuffe Parade, Colaba, Bombay 400 005 from the 2nd Respondent and handover the same to the Applicant.

b) That the Respondent No.2 be directed to pay a sum of Rs.1,86,384/- to the Applicant towards arrears of outgoings including interest on delayed payment upto 31st March, 2002.

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| Arrears for 1993-1999 | Rs.59,047 |
| Outgoing charges | Rs.86,875 |
| Arrears for April-Dec.01 | Rs. 8,757 |
| Telephone Charges | Rs. 2,910 |
| | Rs.1,57,589 |
| Interest on delayed payments | Rs. 28,795 |
| | Rs.1,86,384 |

c) that the Respondent No.2 be directed to pay to the Applicant Rs.6,533/- per month subject to increase by way of damages/mesne profit for wrongful withholding possession of the said Unit No.60 from the date of the Order till the date of handing over of the vacant possession thereof to the Applicant.

d) that the Official Liquidator be directed to pay to the Applicant-MVIRDC Rs.6,533 per month subject to increase by way of compensation till the Official Liquidator handover vacant possession of the said premises to the Applicant.

e) Pending the hearing and final disposal of this Application the Respondent No.2 be directed to

pay to the Applicant outgoings at the rate of Rs.11.75/- per sq.ft. per month on the basis of common outgoings calculated for the year 1999-2000 subject to increase, in respect of the said Unit No.60 from 31st March, 2002, and thereafter to pay the same every month."

One Shri Y.R. Warerkar, General Manager (Administration) of the Centre has made affidavit in support of the Judge's Summons. It is stated that the Centre was incorporated for conducting Scientific Research and Promoting industrial trade not involving any activity for profit. The Centre is governed by the Council of Management on which four are the ex-officio nominees of the Government of Maharashtra. The Government of Maharashtra leased to the Centre a plot of land at Cuffe Parade, Colaba, Mumbai, at a nominal rent for raising construction as per the plans approved by the Municipal Corporation of Greater Bombay for carrying on the activities of the Centre. On 20th July, 1977 the Centre allotted Rustom Mills and Industries Limited (the company in liquidation) (hereinafter referred to as "the Company") a premises admeasuring 568 sq. ft. in Unit No.60 Trade Centre Arcade. The Centre agreed to execute a lease for a period of 60 years on the terms and conditions set out in the said agreement. Pursuant to the said agreement, on completion of the building the possession of the aforesaid unit No.60 comprising first floor premises and a mezzanine floor (first floor/second floor) (hereinafter referred to as "the demised premises"). However, no lease deed was executed in respect of the said lease. Under the terms of lease, set out in the agreement for lease, the company inter-alia was enjoined not to transfer, assign, sale, mortgage, charge or encumber in any manner or otherwise dispose of the demised premises or any part thereof. The Company was enjoined not to let, sublet or under let or allow to be occupied by any other party the demised premises or any part thereof without the permission in writing of the Centre. The Company was made liable to pay the monthly rent and outgoing charges to the Centre. The Centre was entitled, inter-alia, to recover the possession of the demised premises in the event of Company's failure to pay rent or outgoing charges or the Company's ceasing to be a member of the Centre or on Company being ordered to be wound up. It is stated that by order dated 14th October, 1993 made by this Court the Company has been ordered to be wound up. Since then, the possession of the demised premises has been taken over by the Official Liquidator attached to this Court. The Official Liquidator has allowed the demised premises to be used by the respondent

no.2 - Dinesh Rubber Industries. It is also stated that Dinesh Rubber Industries has failed to pay the rent and outgoing charges to the Centre. The Centre is, therefore, entitled to enter the demised premises and to take over the possession thereof.

The Official Liquidator has made the counter affidavit. It is stated that pursuant to the order of winding up of the company made on 14th October, 1993 the Official Liquidator had gone to recover the possession of the demised premises. However, he found that prior to the date of winding up i.e. in April, 1993 the Company had inducted the M/s Dinesh Polyber Limited (hereinafter referred to as 'Dinesh Polyber') and Hi-Rel Powernetics Private Limited (hereinafter referred to as "Hi-Rel") in the demised premises on each floor thereof i.e. on 1st floor and the mezzanine floor (first floor/second floor) for a monthly rent of Rs.10,000/-and Rs.5,000/-respectively. The Official Liquidator had, therefore, sought direction of the Company Court for allowing Dinesh Polyber and Hi-Rel to continue to be in possession of the demised premises on the same terms and conditions. Pursuant to such direction issued by the Company Court, under order dated 1st March, 1994, the Official Liquidator entered into agreements with Dinesh Polyber and Hi-Rel on 27th June, 1994. Under the said agreements, Dinesh Polyber and Hi-Rel were allowed to continue to occupy the part of the demised premises in their respective occupation on condition, inter-alia, that they should pay a monthly rent of Rs.10,000 and Rs.5,000 respectively to the Official Liquidator and shall pay all outgoing charges, taxes, cess, etc. to the Centre. It is stated that both Dinesh Polyber and Hi-Rel have failed to comply with the said terms and conditions inasmuch as they have failed to pay rent to the Official Liquidator as agreed and they have also failed to pay outgoing charges to the Centre.

Mr Kavina has submitted that the Company has forfeited its right to the demised premises by committing breach of the terms and conditions of the agreement for lease. The Company inducted Dinesh Polyber and Hi-Rel in contravention of the said terms; the Company failed to pay monthly rent and outgoing charges regularly. The Centre, therefore, has a right to enter the demised premises and to recover the possession thereof. Besides, the Company has also been ordered to be wound up. Therefore also, in accordance with the terms of the agreement for lease, the Centre is entitled to recover possession of the demised premises. In support of this contention, Mr Kavina has relied upon the judgement of

the Honourable Supreme Court in the matter of RAVINDRA ISHWARDAS SHETHNA V/S OFFICIAL LIQUIDATOR, HIGH COURT, BOMBAY [AIR 1983 SC 1061] and the judgement of this Court in the matter of Anil Private Limited v/s Official Liquidator of GSTC and others (Company Application No.174 of 2001 in Company Petition No.205 of 1996) decided on 10th May, 2002 (Coram: Mr Justice D.A. Mehta). In the alternative, Mr Kavina has submitted that since Dinesh Polyber and Hi-Rel have committed breach of the terms and conditions of the agreements dated 27th June, 1994, they should be called upon to hand over possession of the demised premises to the Official Liquidator. The Official Liquidator should be directed to recover possession of the demised premises.

The learned advocate Mr Roshan Desai has appeared for the Official Liquidator. He has contested the Judge's Summons insofar as the Centre has claimed possession of the demised premises. However, he supports that Dinesh Polyber and Hi-Rel should be ordered to hand over possession of the demised premises to the Official Liquidator. He has submitted that the Centre had agreed to lease the demised premises to the company for a period of 60 years. The said period of 60 years shall expire in the year 2037. The leasehold right of the company is a valuable asset of the company, which is required to be disposed of in accordance with the Companies Act, 1956 (hereinafter referred to as "the Act"). He relies upon the judgements of this Court in the matter of Legal Heirs of Deceased Fakir Chand Ambaram Patel v. OL of Amruta Mills (2002 (3) GLH 367); and of Kanubhai H. Prajapati & Ors. v. Official Liquidator [1999(1) GLR 429] and in the matters of Kailash Financiers (Cal.) P. Ltd. & Ors. [1982 Comp. LJ 100] and VAZ FORWARDING LTD. V. STATE BANK OF INDIA AND OTHERS [85 Comp. Cases 603].

The learned advocate Mrs Soparkar has appeared for Dinesh Polyber. She has admitted that Dinesh Polyber has failed to pay rent regularly. But she has denied that no rent has been paid to the Official Liquidator after August, 1997. She has submitted that after August, 1997 on 30th January, 2000 a sum of Rs.15,522 has been paid to the Official Liquidator towards the outstanding rent. She has also relied upon the receipts issued by the Centre for various sums paid to the Centre. It appears that the said receipts evidence certain payments made in the year 2000 towards the outstanding dues of outgoing charges payable to the Centre.

Mr N.R. Parikh has appeared for Hi-Rel and has produced copy of the letters dated 17th February, 1998

and 28th June, 1999. He has submitted that Hi-Rel vacated the part of the demised premises in its possession and has handed over possession thereof to the Official Liquidator. The Official Liquidator has verified his records and has denied that the said letters were received by the Official Liquidator. The letter dated 17th February, 1998 has been written by Hi-Rel addressed to the Company, copy endorsed to the Official Liquidator. It refers to the shifting of the office premises of Hi-Rel to a premises at Andheri and handing over of the charge of the portion of the demised premises in occupation of Hi-Rel. The letter dated 28th June 1999 addressed by Hi-Rel to the Official Liquidator refers to Hi-Rel's vacating the demised premises on 17th February, 1998. Under the cover of the said letter a cheque in the sum of Rs.30,000/-- has also been sent to the Official Liquidator. Though both the above letters are purported to have been written long before the date of this application, Hi-Rel has neither filed the affidavit nor the said letters have been produced on the records of the matter. As there is nothing on record to satisfy this Court that the said letters were written at the relevant time; were sent to the addressee and were received by the addressee, I believe that the said letters have been concocted with a view to getting out of the liability to pay rent as agreed under the above referred agreement dated 27th June, 1994.

In the matter of Ravindra Ishwardas (supra) a similar question arose before the Hon'ble Supreme Court. In the said matter the learned Company Judge of the Bombay High Court had made the order of winding up of company. Pursuant to the order of winding up the Official Liquidator took over the possession of the office premises of the company. Subsequently, under the orders of the Court, the Official Liquidator entered into a caretaker agreement with respect to the office premises. The landlords of the said office premises took out the Judge's summons and prayed for a direction to the Liquidator to terminate the caretaker's agreement and to hand over the vacant and peaceful possession of the premises to the landlords. In the appeal arising from the said claim, the Hon'ble Supreme Court held that Section 457 of the Act enables the liquidator, with the sanction of the Court, amongst others, to carry on the business of the company so far as maybe necessary for the beneficial winding up of the company. The Court observed that the said power to carry on the business of the company can be utilised only for the beneficial winding up of the company and not for making profit from it. The Honourable Court further observed that giving away the

premises under caretaker's agreement was not the business of the company. Further, the premises was not required by the Official Liquidator for the purpose of winding up of the company. The Honourable Court, therefore, directed that the possession of the said office premises be handed over to the appellant-landlord.

In the matter of Anil Private Limited (supra) this Court following the above judgement of the Honourable Supreme Court directed the Official Liquidator to hand over vacant and peaceful possession of the premises in question to the landlord thereof.

A similar question arose in the matter of legal heirs of deceased Fakir Chand Ambaram (supra). In several matters where the Official Liquidator had taken over the possession of the assets of the companies (in liquidation) the landlords of such premises claimed the possession thereof. All such matters came up for hearing before my esteemed brother Mr Justice D.A. Mehta. On behalf of the landlords reliance was placed on the above referred Supreme Court judgement [AIR 1983 SC 1061]. The learned Judge distinguished the said judgement and held that in the matter before the Honourable Supreme Court the date of commencement of the lease was not available and it was not the case of the Liquidator that the lease was of a long duration. The Official Liquidator did not need the premises for carrying on winding up activities nor was the premises required for the business of the company. The learned Company Judge had directed to give the premises to a third party under a caretaker agreement. The direction issued by the Honourable Supreme Court, therefore, should be read in context of the above set of facts. The learned Judge relying upon several other judgements held as under:-

"(a) Leasehold interest is an intangible asset, which is valuable in nature though the valuation may differ from case to case depending upon the unexpired period of lease.

(b) Such an asset is transferable subject to the same terms and conditions as may be stipulated in the lease deed.

(c) Once there is a contract which has not been determined, the relationship of the parties to the contract continues to subsist till the period for which the contract is in existence subject to an express condition to the contrary.

(d) There is a distinction between the point of time when an order of winding up is made and at the point of time when an order of dissolution is made, the company continues to exist between the two termini."

Mr Desai has heavily relied upon this judgement and has submitted that in the present case, the lease being for a period of 60 years, expires in the year 2037. The remaining period of lease is a valuable asset which can be sold and the sale proceeds can be appropriated for discharge of the debts of the Company. Mr Kavina has also relied upon the said judgement and has submitted that while setting out the above referred principles the learned Judge has made an exception with respect to the lessees who commit breach of the terms and conditions of the lease and where under the agreement the landlord has a right to forfeiture. He has relied upon the words, "in none of the cases, was it contended or pointed out that if there is any breach of express condition which entitle the landlord to invoke forfeiture. Even if nonpayment of rent for a particular period could be treated as a breach of one of the conditions the terms of the lease deeds do not envisage forfeiture", appearing in paragraph no.37 of the judgement. Mr Kavina has strenuously urged that in the present case indisputably the Company has committed breach of the terms and conditions of the agreement and the Centre has a right to forfeiture.

In the matter of K.H. Prajapati (supra) this Court summarised the principles as under:-

"1. The rights and obligations arising under Rent laws as landlord and tenant subsist between the owner and the company in liquidation after the order of winding up is made until the company is dissolved.

2. The leased property cannot be transferred or alienated contrary to the provisions of the Rent laws.

3. Even where the company has closed its business and the premises are not required for the purposes of carrying on the business, still the Official Liquidator is entitled to retain possession if it is required by him during the course of winding up for the purpose of company's affairs, for

example, keeping records, storing the stock-in-trade and other movables or if the same are occupied by plant and machinery. Such requirement is relevant consideration for refusing the permission to return possession to the landlord; and

4. The leasehold tenancy rights under a lease are the assets of the company which may be dealt with and transferred if Official Liquidator is required to transfer the assets of the company as a going concern subject of course to law permitting the same. The transferability of the assets is a relevant consideration while deciding the question whether the property is burdened with onerous covenants."

In Re. Kailash Financiers (Cal.) P. Ltd. & Ors. the Hon'ble Calcutta High Court has taken a similar view i.e., "the tenancy right or the leasehold right is one of the most valuable assets of the company (in liquidation) to be dealt with by the Court, which is deemed to be in custody of all the assets of the company under Section 456(3) of the Companies Act, 1956." "This also cannot be disputed that for the beneficial winding up, the Official Liquidator in course of winding up can retain possession of any property of the company until the dissolution of the company pursuant to the order of the Court"

Similar is the view expressed by the Bombay High Court in Re. VAZ FORWARDING LTD. (supra). The Court has held that subsisting lease is a valuable asset of the company (in liquidation). The same can be assigned. In the said matter the company (in liquidation) was a banking Company and under the relevant lease agreement had a right of assignment of the leasehold premises.

Thus, there is no gainsaying that a leasehold right of a company (in liquidation) is a valuable asset. By virtue of the provisions of the Act, on order of winding up being made, the Company Court becomes the custodian of all the assets of the company including the leasehold right. The Official Liquidator acts under the supervision and control of the Company Court. Hence, the Official Liquidator holds the leasehold rights. The leased premises can be used by the Official Liquidator for the beneficial winding up of the company. The leasehold rights can be sold or assigned also but, in

consonance with the lease agreement.

In the present case the first question that arises is in respect of the nature of the leasehold right that the Company had in the demised premises. It is vehemently argued that the demised premises was given on lease for a period of 60 years. Unutilised period is a valuable asset of the company, which can be sold or assigned. I am afraid, I am unable to agree with this contention. Section 107 of the Transfer of Property Act, 1882 provides, inter-alia, that lease of an immovable property for any term exceeding one year can be made only by a registered instrument. Such instrument shall be executed by both the lessor and lessee. In the present case, admittedly, no registered lease deed has been executed. The demised premises had been given away under the agreement to lease. In similar circumstances a Division Bench of this Court in the matter of SHAH BABULAL SOMALAL [20 GLR page 36] has relied upon the judgement of the Hon'ble Supreme Court in the matter of RAM KUMAR DAS V. JAGDISH CHANDRA DEO, DHABAL DEV & ANR. [AIR 1952 SC page 23]. It has been observed that, "though rent-note exh.19 is inoperative in law because, though it is compulsorily registerable, it has not been registered, it certainly gives rise to a presumption under Section 106 of the Transfer of Property Act that the relationship which was established between the parties was that of landlord and tenant and that it was a monthly tenancy."

If this principle has to be applied to the facts of the present case, the Company, in absence of a registered lease deed, can be said to be a tenant by the month and not a lessee for a period of 60 years. Further, the lease agreement prohibits the Company from assigning, subletting or underletting the demised premises to any other person without express permission in writing of the Centre. In the present case the Company did assign/sublet the demised premises to Dinesh Polyber and Hi-Rel in breach of the above condition. The Centre had a right to forfeiture also in case of winding up of the Company. Hence, in my view, having regard to the several covenants of the lease agreement conferring right of forfeiture upon the Centre and the Company having committed breach of certain covenants, as recorded hereinabove, the Centre has a right to recover the demised premises.

The Official Liquidator being custodia legis of the assets of the Company could not have assigned or transferred the leasehold right of the Company in the

demised premises except in accordance with the terms of the lease agreement. The terms of the lease agreement clearly prohibits transfer or assignment of the leasehold right except with the express permission of the Centre in writing. In the instant case, the Official Liquidator had sought direction of the Company Court to allow Dinesh Polyber and Hi-Rel to continue in possession of the demised premises in violation of the terms of the lease agreement.

Further, as recorded hereinabove, Dinesh Polyber and Hi-Rel have failed to comply with the terms and conditions of the assignment made in their favour by the Official Liquidator on 27th June, 1994. Therefore also, Dinesh Polyber and Hi-Rel have no right to continue in possession of the demised premises and are required to hand over the possession thereof to the Official Liquidator.

In above view of the matter, Dinesh Polyber and Hi-Rel are directed to hand over the vacant and peaceful possession of the demised premises to the Official Liquidator forthwith. Dinesh Polyber and Hi-Rel are also directed to pay the amount of outstanding rent to the Official Liquidator, as agreed under the above referred agreements dated 27th June, 1994 till the date they hand over the vacant possession of the demised premises. In case of failure of Dinesh Polyber and Hi-Rel to pay the outstanding amount of rent, the Official Liquidator shall be entitled to take appropriate steps for recovery of such amount. The Official Liquidator shall, on receiving the possession of the demised premises from Dinesh Polyber and Hi-Rel hand over the vacant and peaceful possession of the demised premises to the Centre. The Official Liquidator shall remove all the furniture and other articles, which maybe lying in the demised premises. The Centre shall be entitled to recover the outstanding amount of outgoing charges due and payable by Dinesh Polyber and Hi-Rel. On recovery of the outstanding amount of rent from Dinesh Polyber and Hi-Rel the Official Liquidator shall pay the outstanding amount of rent due and payable to the Centre as agreed under the lease agreement.

The application stands allowed in the above terms.

[ Miss R.M.Doshit, J. ]

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